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ENFORCEMENT AND ADMINISTRATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969: DO THE ENDS JUSTIFY THE MEANS?

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I. INTRODUCTION

While evidence of the production of coal in North America extends back nine hundred years or more, formal attention to the regulation of mining practices to minimize the attendant hazards is of comparatively recent origin. It was not until 1910 that the United States Bureau of Mines was established,¹ culminating efforts to create a national mining authority that began in 1865.² However, the authority to inspect and investigate in coal mines was not extended to the Bureau until 1941.³ Finally, in 1952 the Bureau was empowered for the first time to enforce mandatory safety standards legislated by Congress.⁴

In 1969, the Federal Coal Mine Health and Safety Act⁵ was passed by Congress to comprehensively regulate mining practices

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¹ Act of May 16, 1910, ch. 240, § 1, 36 Stat. 369 (codified at 30 U.S.C. § 1 (1970)).

² S. 21, 39th Cong., 1st Sess. (1865); see HOUSE COMM. ON EDUC. & LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY: FEDERAL COAL MINE HEALTH AND SAFETY ACT (Comm. Print 1970) [hereinafter cited as LEGISLATIVE HISTORY]; Howerton, *The Federal Coal Mine Health and Safety Act of 1969*, 16 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 539, 541 (1971).

³ Act of May 7, 1941, ch. 87, §§ 1-4, 55 Stat. 177-78 (codified at 30 U.S.C. §§ 451-54 (1970)); LEGISLATIVE HISTORY 4.

⁴ Act of July 16, 1952, ch. 877, § 1, 66 Stat. 693-94 (codified at 30 U.S.C. §§ 472-73 (1970)); LEGISLATIVE HISTORY 4-6.

⁵ Act of Dec. 30, 1969, Pub. L. No. 91-173, 83 Stat. 742, *repealing* 30 U.S.C. §§ 451-83 (1964), (codified at 30 U.S.C. §§ 801 *et seq.* (1970)) [hereinafter referred to as Act].

in order "to improve the health and safety conditions of persons working in the coal mining industry"⁶ This statute, rivaling even the tax laws in complexity, is one of the most thoroughgoing and significant pieces of occupational safety and health legislation ever enacted by any government.⁷

While a comparison of the 1952 and 1969 enactments will convince the student that there have been extraordinary extensions in the scope of the practices and conditions coming within the purview of the regulatory power,⁸ the enforcement scheme has remained relatively unchanged on paper.⁹ This is not to say, however, that actual enforcement activity has remained constant. In fact, the number of inspections and, thus, the number of consequent violation notices and closure orders issued pursuant to federal legislation has dramatically accelerated.¹⁰

The pervasive nature of the regulatory scheme and the sheer volume of inspections leading to the issuance of violation notices and closure orders have generated heated controversy among representatives of the industry, the government, and the United Mine Workers of America.¹¹ The interface created by production pres-

⁶ LEGISLATIVE HISTORY 1.

⁷ See Perkins, *Forward* to HOUSE COMM. ON EDUC. & LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY: FEDERAL COAL MINE HEALTH & SAFETY ACT at iii (Comm. Print 1970). Carl B. Perkins was the Chairman of the House Committee on Education and Labor during the Ninety-first Congress.

⁸ See LEGISLATIVE HISTORY 1-3.

⁹ Compare the repealed 30 U.S.C. § 473 (1964) with 30 U.S.C. § 814 (1970).

¹⁰ In 1970, as the enforcement of the Act was being organized by the Bureau of Mines, there were 10,184 inspections of surface and underground coal mines conducted pursuant to the 1952 and 1969 Acts. U.S. DEP'T OF INTERIOR, TOWARDS IMPROVED HEALTH AND SAFETY FOR AMERICA'S COAL MINERS 27-28 (1971). In 1972, the number of inspections had soared to nearly 60,000 per year. U.S. DEP'T OF INTERIOR, ADMINISTRATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT 2 (1973).

The number of violation notices and closure orders also showed an increase during this period. In 1970 there were approximately 1,500 closure orders served and nearly 38,000 violation notices. U.S. DEP'T OF INTERIOR, TOWARDS IMPROVED HEALTH AND SAFETY FOR AMERICA'S COAL MINERS 2-3 (1971). This activity had accelerated such that during 1972, more than 1,600 closures were ordered and 76,000 violation notices were issued. U.S. DEP'T OF INTERIOR, ADMINISTRATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT 2 (1973).

¹¹ Examples of this friction are many. The 1974 contract negotiations between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA) featured heated issues of safety as well as economics. See, e.g., UNITED MINE WORKERS JOURNAL, Sept. 1-15, 1974, at 3; *id.*, Oct. 1-15, 1974, at 7. The UMWA has also been carrying out a concerted campaign to oust the acting director of the Mining Enforcement and Safety Administration, James Day. *Id.*,

tures in an energy-dependent and profit-dependent economy and the desperate need to prevent the tragic depletion of what is fashionably termed for political advantage as the industry's "most valuable resource"—the coal miner himself¹²—is most often joined in legal proceedings to review the issuance by federal inspectors of violation notices and closure orders.¹³

This article is an attempt to evaluate some of the legal issues that have developed in the review of administrative enforcement activity under section 104 of the Act.¹⁴ Such an inquiry of necessity must embrace not only the manner in which initial enforcement discretion is exercised by inspectors of the Mining Enforcement and Safety Administration (MESA),¹⁵ but also, and more importantly, the manner in which the quasi-judicial arm of the Department of Interior¹⁶ has interpreted and applied, and frequently misinterpreted and misapplied, the enforcement provisions of the Act.

II. A BRIEF OVERVIEW OF THE ENFORCEMENT SCHEME

The basic scheme¹⁷ for enforcing the mandatory safety and

Jan. 16-31, 1975, at 16.

At least one commentator has written extensively on the decrease in production occasioned by increased enforcement activity. Straton, *Survey Measures Impact of the Health and Safety Act on Underground Coal Mining*, MINING ENGINEERING, Oct., 1972, at 64; Straton, *Effects of Federal Mine Safety Legislation on Production, Productivity, and Costs*, MINING CONGRESS JOURNAL, July, 1972, at 19; Straton, *Effects of Safety Legislation on Productivity*, MINING CONGRESS JOURNAL, August, 1971, at 28. Moreover, since many coal sales contracts provide for price increases to offset cost increases from the new enactment, litigation and arbitration to determine the amounts of these increases have blossomed. See Straton, *Survey Measures*, *supra* at 64-65.

¹² LEGISLATIVE HISTORY at 1.

¹³ 30 U.S.C. § 815 (1970).

¹⁴ 30 U.S.C. § 814(a)-(c) (1970).

¹⁵ The Mining Enforcement and Safety Administration (MESA) was established by the Secretary of Interior to assume certain functions formerly exercised by the United States Bureau of Mines, notably the responsibilities imposed by the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §§ 721-40 (1970). 39 Fed. Reg. 23996 (1974).

¹⁶ The Office of Hearings and Appeals. See 43 C.F.R. §§ 4.1, 4.500-4.605 (1974).

The Office of Hearings and Appeals includes a Hearings Division through which applications for review are assigned to individual administrative law judges for hearing and initial decision. Thereafter, an appeal may be had through the Interior Board of Mine Operations Appeals (IBMA), which serves as the delegate of the Secretary of Interior for the purpose of reviewing the issuance of notices and orders and the assessment of civil penalties under the Act.

¹⁷ This section discusses only the enforcement program established by sections

health standards and detecting and citing imminent dangers is found in section 104 of the Act.¹⁸ Section 104 establishes a three-tier enforcement pattern differentiated by degrees of danger and the culpability of the operator in permitting such conditions to come about. The initial enforcement discretion is entrusted to the duly authorized representatives of the Secretary of Interior known commonly as "inspectors." The inspectors may issue notices of violation and even orders of withdrawal upon the unilateral determination that the appropriate preconditions have been satisfied.

At the top of the hierarchy is the section 104(a) withdrawal order that the MESA inspector may invoke to order summary evacuation of personnel and abatement action whenever a condition or practice presenting an imminent danger is discovered.¹⁹ This closure is available without regard to the characterization of the operator's conduct as negligent or otherwise and may be issued to control conditions or practices that are not violations of mandatory safety standards or that are wholly natural in origin.²⁰ The preeminent concern is to save lives and prevent injury by withdrawing personnel from the area of danger and initiating abatement procedures.²¹

Section 104(b) provides for the issuance of a notice of violation whenever the MESA inspector determines that there has been a violation of a mandatory health or safety standard which has not created an imminent danger.²² The notice served upon the operator must fix a reasonable time period within which the violation must

104(a)-(c) of the Act. There are, however, additional enforcement tools provided. For instance, when the amount of respirable dust in a working area reaches an unacceptable level, section 104(i) provides for the issuance of notices and orders to restore a healthy environment. 30 U.S.C. § 814(i) (1970). Section 104(h) provides for action by the inspector when unusual conditions arise for which there is no method of abatement under existing technology. 30 U.S.C. § 814(h) (1970).

There are also provisions in the Act for the exercise of authority to investigate mine accidents and supervise rescue work. 30 U.S.C. § 813(d)-(f) (1970).

¹⁸ 30 U.S.C. § 814 (1970).

¹⁹ 30 U.S.C. § 814(a) (1970). An imminent danger is defined by the Act as "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j) (1970).

²⁰ LEGISLATIVE HISTORY 89.

²¹ *Id.*; see *Eastern Associated Coal Corp.*, 2 IBMA 128, 141, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,187 at 21,162 (1973) (Doane, A.L.J., dissenting), *aff'd sub nom.* *Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277 (1974).

²² 30 U.S.C. § 814(b) (1970).

be corrected. If, at the close of such period, the violation has not been abated, the inspector must determine whether the time period should be extended or whether an order of withdrawal should be issued for noncompliance.²³ The violation notice is based strictly on the existence of a violation, without regard to the responsibility of the operator in the bringing about of such condition. The order, however, is based upon the operator's failure to reasonably effect compliance once the condition or practice has been cited.

Section 104(c)²⁴ provides a complicated, three-stage progression of a notice of violation and closure orders. The notice and orders available as enforcement tools pursuant to this provision are based on the violation of a mandatory safety or health standard which, while not creating an imminent danger, could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In addition, the inspector must also evaluate the culpability of the operator in bringing about the cited conditions. When a mandatory standard is found to be violated, the MESA inspector must issue a section 104(c)(1) notice if he finds that the cited conditions were caused by the operator's "unwarrantable failure" to comply with the standard and also presented the requisite level of danger.²⁵

Following the issuance of a notice of violation pursuant to section 104(c)(1), the operator is effectively placed on a ninety-day "probation." If another violation of a mandatory standard is found on the same inspection during which the notice was issued, or during another inspection within ninety days, the inspector must issue a section 104(c)(1) withdrawal order if he finds that the new violation meets the same standards of hazardousness and culpability as are required for issuance of the notice.²⁶ Thereafter, the inspector has available the section 104(c)(2) closure order to compel compliance. This order may be issued repeatedly on subsequent inspections if the inspector discovers a violation of a mandatory health and safety standard that is similar to the section 104(c)(1) notice or order by virtue of its hazardousness and the operator's unwarrantable failure in permitting the violation to exist. When an inspection of the mine, following the issuance of the section 104(c)(1) order, discloses no violations similar in danger or

²³ *Id.*

²⁴ 30 U.S.C. 1 814(c) (1970).

²⁵ 30 U.S.C. § 814(c)(1) (1970).

²⁶ *Id.*

culpability of the operator to the violation precipitating the section 104(c) order, this progression recycles to the section 104(c)(1) notice stage.²⁷

The peremptory closure authority embodied in sections 104(a) and 104(c) simultaneously represents one of the most salutary safety mechanisms and the greatest potential for costly and damaging abuse of discretion of any provisions in the Act.

III. SUMMARY CLOSURE AUTHORITY UNDER SECTION 104(a): IMMINENT DANGER

Section 104(a) of the Act²⁸ extends to the MESA inspector the awesome power to order summarily the cessation of mining activity and the evacuation of personnel from all or part of a mine upon a unilateral determination that an imminent danger exists. The authority of federal coal mine inspectors to order the withdrawal of personnel from areas of imminent danger was first provided in 1952,²⁹ and the scope—although not the nature—of the authority was greatly expanded in the current enactment in 1969.³⁰ The concept of “imminent danger” includes both the seriousness and the proximity of the hazard. The Act defines an imminent danger as “the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”³¹

The legislative understanding of imminent danger and the policy behind the closure authority are best demonstrated by the frequently cited passage from the Senate Report:

The concept of an imminent danger as it has evolved in this industry is that the *situation is so serious* that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. *Delays, even of a few minutes, may be critical or disastrous.* After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector.³²

²⁷ 30 U.S.C. § 814(c)(2) (1970).

²⁸ 30 U.S.C. § 814(a) (1970).

²⁹ Act of July 16, 1952, ch. 877, § 1, 66 Stat. 693-94 (codified at 30 U.S.C. §§ 472(a), 473(a)(1) (1964)).

³⁰ See, e.g., LEGISLATIVE HISTORY 45.

³¹ 30 U.S.C. § 802(j) (1970).

³² LEGISLATIVE HISTORY 89 (emphasis added).

There is virtually no disagreement regarding the reasonableness of providing such authority to MESA inspectors, since safety and production are interests shared by both management and labor and are inseparable in the long run. This is not to suggest, however, that there is not considerable controversy over the actual exercise of the enforcement discretion that section 104(a) confers. In balancing the sometimes short-run competition between the safety of the miners and the peremptory seizure of the operator's property, the Interior Board of Mine Operations Appeals (IBMA), has construed the imminent danger standard as virtually eradicating the temporal factor which is the essence of the power conferred. The effect of the IBMA's administrative gloss on the imminent danger standard has been to create a congressionally unanticipated closure power that is similar to that under section 104(c), in that some general hazard potential must be shown. However, unlike the closure authority provided under section 104(c), the IBMA's version of section 104(a) is not encumbered with the safeguards Congress designed to prevent random and unchecked utilization of the drastic closure power.

The statutory definition of "imminent danger" clearly provides that the existence of conditions or practices that "could reasonably be expected to cause death or serious physical harm" is a necessary but insufficient condition precedent to the issuance of a section 104(a) order of withdrawal.³³ This condition essentially outlines the degree and probability of the hazards cognizable under section 104(a). Significantly, this standard is virtually identical to the threshold danger level in the section 104(c) context: "a probable risk of serious bodily harm or death . . ."³⁴

³³ Eastern Associated Coal Corp., 2 IBMA 128, 143, 1971-1973 CCH OCCUPATIONAL HEALTH & SAFETY DEC. ¶ 16,187 at 21,163 (1973) (Doane, A.L.J., dissenting), Carbon Fuel Co., 2 IBMA 42, 49, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 15,471 at 20,750 (1973).

In *Carbon Fuel* the Bureau of Mines (now MESA) argued in its brief, and the IBMA so held, that a finding of imminent danger required a two-part determination. First, the existence of a danger of sufficient magnitude and likelihood had to be assured from the cited conditions or practices. After that threshold consideration had been satisfied, it had to be determined that the anticipated death or injury could result before the time required for abatement had elapsed. Brief for Appellee at 15-16, Carbon Fuel Co., 2 IBMA 42, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 15,471 (1973). See also Eastern Associated Coal Corp., 2 IBMA at 143, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. at 21,162.

³⁴ Eastern Associated Coal Corp., 3 IBMA 331, 349, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 at 22,602 (1974).

Thus, the primary distinction between the closures authorized by sections 104(a) and 104(c) is denoted by the corequisite for the imminent danger order: the proximity of the hazard to actualization.³⁵

The initial inquiry as to whether the cited conditions meet the requisite standard of gravity and probability of harm is, of course, fundamental to evaluation of any situation allegedly presenting an imminent danger. Naturally there is no formula approach to this inquiry, since the outcome in each case is dependent upon the relevant facts. For purposes of the discussion in this article, we propose to pass over this question of gravity and probability, pausing only to make one observation that seems equally applicable to the primary focus, namely, the question of imminence itself. We have noted that virtually without exception, in litigation involving this issue, the IBMA and administrative law judges have been readily satisfied that a requisite degree of threatening consequences to life and limb is present. This result is generally reached by a process of stacking and compounding inferences of cause and effect, irrespective of the presence or absence of independent, precipitating factors, until the necessary danger is fabricated.

An “imminent” danger, by dictionary definition, is a danger which is threatening to occur immediately or is at the point of happening.³⁶ The urgency implied by the congressional expression “imminent” is elaborated in the Senate Report by the concern that “[d]elays, even of a few minutes, may be critical or disastrous.”³⁷ There can thus be no question that Congress considered the temporal element to be the *sine qua non* of the exercise of the section 104(a) withdrawal authority. If the urgency is absent, then action must be taken, if at all, under sections 104(b) or 104(c). Consequently, in the statutory formulation, “imminent” is defined in relation to the time period required for abatement action to defuse the immediate threat of death or serious physical harm.³⁸

The time required for abatement, therefore, is the practical measure of the proximity of the danger to actualization. This inter-

³⁵ Of course, there are other important distinctions as well, such as the existence of an unwarrantable failure to comply with a mandatory safety or health standard.

³⁶ Eastern Associated Coal Corp., 2 IBMA 128, 141, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,187 at 21,162 (1973) (Doane, A.L.J., dissenting).

³⁷ LEGISLATIVE HISTORY 89.

³⁸ 30 U.S.C. § 802(j) (1970).

pretation was promoted by the Bureau of Mines,³⁹ and was apparently adopted initially by the IBMA in its 1973 decision in *Carbon Fuel Co.*⁴⁰ The IBMA, however, abandoned this position soon thereafter in *Eastern Associated Coal Corp.*⁴¹ There the IBMA held that

the phrase in the definition [of imminent danger,] “before such condition or practice can be abated,” in no way relates to the time it may take to abate but relates solely to the condition of “imminence” of danger. *In other words, a condition or practice cannot be imminently dangerous if the specific and usual mining activity can safely continue in the area during (or prior to) the abatement process.*⁴²

The significance of this construction of “imminent” can best be judged by reference to the facts in *Eastern Associated*. The cited danger there resulted from the loosening and projection downward of two roof bolts into a shuttlecar haulageway, thereby reducing the vertical clearance in the passage. When the inspector entered the section, the condition had already been discovered and was being corrected under the supervision of the section foreman. There was no danger at that time since the haulageway had been closed to traffic until proper clearance was restored.⁴³

Despite the voluntary closure of the haulageway removing any threat of physical danger, the IBMA held that a section 104(a) closure order was properly issued. The rationale was that normal operations could not have proceeded in this section without a reasonable likelihood of death or serious physical injury.⁴⁴ It is clear, however, that the order was not issued to evacuate miners from an impending peril, but to permit the inspector to assume “jurisdiction” over the section.⁴⁵ This exercise of control could have been

³⁹ See note 33 *supra*.

⁴⁰ 2 IBMA 42, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 15,471 (1973). See also *Eastern Associated Coal Corp.*, 2 IBMA 128, 143, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,187 at 21,163 (1973) (Doane, A.L.J., dissenting).

⁴¹ 2 IBMA 128, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,187 (1973), *aff'd per curiam sub nom.* *Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277 (4th Cir. 1974).

⁴² 2 IBMA at 143, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. at 21,162 (emphasis added).

⁴³ *Id.* at 131-33, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. at 21,160-61.

⁴⁴ *Id.* at 135-37, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. at 21,161.

⁴⁵ *Id.*

more properly effectuated, if indeed it were necessary at all, by the issuance of a notice of violation under section 104(b), providing that abatement be completed within a reasonable time.

The IBMA's holding in *Eastern Associated* imposes upon the imminent danger standard an artificial hypothesis that coal production will continue in all cases. This graft on the statute is frequently inappropriate, as in *Eastern Associated*, and serves only to contrive a presumption of imminence when the reality is otherwise. The net effect is to eliminate the temporal factor, thereby defeating the congressional mandate that section 104(a) closure orders be issued only in emergency situations to save lives.⁴⁶

For a danger to be imminent, as a practical matter, all of the conditions necessary to bring about death or serious physical harm must be present or likely to develop before abatement eliminates the threat. If such is not the case, then death or serious physical harm is not threatening to occur immediately, nor is it at the point of happening. The fact that corrective action should be initiated does not require, ipso facto, that such abatement be ordered pursuant to section 104(a).

Soon after its decision in *Eastern Associated*, the IBMA had occasion to rule again on the most frequently alleged imminent danger situation, namely, potential fire or explosion from accumulations of loose coal and coal dust. In *Freeman Coal Mining Co.*⁴⁷ the administrative law judge ruled in his initial decision that an accumulation of float coal dust along a belt line of 7200 feet did not create an imminent danger. The judge reasoned that there was no likelihood of a fire or explosion because there was no source of ignition present in the affected area. Moreover, the float coal dust was not in suspension, and methane was absent from the beltway. The testimony further indicated that the inspector had issued the imminent danger closure order, not upon his own independent judgment, but rather, pursuant to "pre-fabricated" guidelines that an extensive accumulation of float coal dust was automatically subject to section 104(a). The administrative law judge finally concluded that while there were violations of the mandatory standards, the conditions present or likely to develop did not pose a reasonable expectation of death or serious injury pending the com-

⁴⁶ LEGISLATIVE HISTORY 89.

⁴⁷ 2 IBMA 197, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,667 (1973), *aff'd sub nom.* *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974).

pletion of abatement activity.⁴⁸

The IBMA, however, overruled the administrative law judge and held that an imminent danger did exist. The IBMA felt that "imminence" was supplied by the fact that eight or nine years earlier there had been a dust explosion in the mine, that methane might be released since the mine was classified as gassy under state law, and that there had been two recent incidents of methane accumulation.⁴⁹ However, none of these conditions could interact with the float coal dust to create a fire or explosion, especially in the hour or so that would have been required to inert the combustible float dust.⁵⁰

Freeman, which relied upon the prior holding in *Eastern Associated*,⁵¹ clearly eliminated the temporal element embodied in the statutory definition of imminent danger. All that is now required to issue a section 104(a) closure order is an "eminent" danger—one that is very serious, regardless of the likelihood that it will cause death or serious injury before abatement. This view was accepted by the United States Court of Appeals for the Seventh Circuit upon appeal of the *Freeman* decision. There the court held: "An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make an impending threat virtually an immediate one."⁵²

This astonishing treatment of the congressional standard of *imminent* danger indicates a discouraging trend. The court of appeals ruled that the absence of an ignition source only proved that a fire or explosion "might not have occurred immediately."⁵³ Yet from the facts of the case, it could not have occurred at all! Clearly, *Freeman* proved only that the existing conditions met the requisite standard of gravity for a section 104(a) closure order. It was never shown that the conditions necessary to supply the corequisite of imminence were present or likely to develop before abatement was completed.

⁴⁸ *Freeman Coal Mining Co.*, Docket No. VINC 72-59, at 4-9 (Oct. 19, 1972).

⁴⁹ 2 IBMA 211-14, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. at 21,395.

⁵⁰ *Freeman Coal Mining Co.*, Docket No. VINC 72-59, at 5.

⁵¹ 2 IBMA at 212, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. at 21,395.

⁵² *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 745 (7th Cir. 1974).

⁵³ *Id.* at 746.

This redesign of section 104(a) by the IBMA has, in effect, created an unauthorized withdrawal order where imminence is not required. Instead, all that must be shown is the presence of some conditions that are potentially dangerous when in combination with other precipitating factors. However, these triggering factors necessary to create a condition of imminent danger need not be shown to exist or even be likely to develop.⁵⁴ Thus, imminent danger has developed a “possible,” or “eventual,” dimension, instead of the “probable and immediate” character intended by Congress.

IV. SECTION 104(c): THE PUNITIVE CLOSURE PROVISION

Section 104(c) of the Act,⁵⁵ as previously noted,⁵⁶ provides a complex, progressive series of enforcement measures to deal with

⁵⁴ Old Ben Coal Corp., 3 IBMA 282, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 18,297 (1974), *appeal docketed*, No. 74-1655, 7th Cir., Aug. 14, 1974; Old Ben Coal Corp., 2 IBMA 271, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 18,227 (1974), *appeal docketed*, No. 74-1656, 7th Cir., Aug. 14, 1974; Old Ben Coal Corp., Docket No. VINC 73-96, at 22-23, 27, 47 (Nov. 20, 1974), *appeal docketed*, IBMA 75-17, Dec. 4, 1974.

An illustration of the virtual eradication of the elements of immediacy and probability from the imminent danger standard is provided by the decision in VINC 73-96, *supra*. There the administrative law judge stated that the IBMA

has construed the Act as prohibiting the accumulation of coal and coal dust whenever there is a setting from which it can reasonably be concluded that if a *fortuitous fire or ignition occurs it can reasonably be expected to cause death or serious physical harm before the conditions . . . can be abated . . .*

Id. at 22 (emphasis added).

This application of the imminent danger standard in section 3(j) of the Act is typical of the recent decisions by the IBMA and administrative law judges. Clearly, there is a presumption that whatever conditions are required to make the threat to life and limb immediate may be assumed to exist or likely to occur without any such actual showing:

Under controlling decisions of the [IBMA] and the courts, accumulations of loose coal, coal dust and float coal dust in a gassy mine with a bad roof condition together with *potential* sources of ignition or fire are sufficient to constitute an imminent danger, *whether or not there is reason to fear an actual ignition or fire*.

Id. at 47 (emphasis added).

The IBMA has characterized situations as imminent when in fact all of the necessary preconditions for imminence are not in existence or reasonably likely to occur. This misapplication of the Act, cannot be corrected simply by assuming that the absent conditions will automatically appear if normal mining operations continue. Thus, the IBMA has read the phrase “before such conditions can be abated” completely out of the Act.

⁵⁵ 30 U.S.C. § 814(c) (1970).

⁵⁶ See notes 24-27 *supra* and accompanying text.

a limited class of violations of the mandatory safety and health standards. This section addresses itself to those violations that could significantly and substantially contribute to a mine safety or health hazard and are also caused by the operator's "unwarrantable failure" to comply with the standards cited. Because any action taken pursuant to section 104(c) is conditioned upon the express disavowal of imminent danger⁵⁷ and the finding of a degree of negligence expressed as an unwarrantable failure, it is clear that closure orders issued pursuant to this section are not taken for short-run protective purposes, but rather to punish those operators who are "recalcitrant" in their noncompliance with the mandatory standards.⁵⁸

As the section 104(c) closure provisions appear to be becoming more frequently invoked, increased attention has been focused on the interpretation of its provisions. While there have not as yet been any judicial constructions of the section, the IBMA has recently issued a series of decisions that purport to clarify its interpretation and administration of section 104(c). The interpretive problems arise not only from the complexity of the progression of notices and orders (the "C series"), but also from the ambiguous expressions used by Congress to define the nature and degree of the hazard and the negligent conduct cognizable under the section. Ironically, the major problem of construction was created by the IBMA's elaborate interpretation of what appeared to be the only simple term in section 104(c), an "inspection."

A. The Gravity of the Danger

Section 104(c) provides, as a necessary condition for issuance of a notice or order, that the violation of a mandatory standard "significantly and substantially contribute to the cause and effect of a mine safety or health hazard."⁵⁹ The proximity of this danger to actualization differs materially from that of an imminent danger under section 104(a), since a significant and substantial danger might only result in a notice of violation under section 104(c)(1), although a closure order may be issued depending on the stage of the 'C series' when the violation is found.

The important consideration, therefore, is the degree of grav-

⁵⁷ 30 U.S.C. § 814(c) (1970).

⁵⁸ Eastern Associated Coal Corp., 3 IBMA 331, 351, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 at 22,602 (1974).

⁵⁹ 30 U.S.C. § 814(c)(1) (1970).

ity attendant upon the conditions creating a violation of a mandatory standard. Clearly, any violation of a mandatory standard must be presumed to create some danger; otherwise, there would be no need for the regulatory provision. However, for the violation to be cognizable under section 104(c), this danger must be reasonably grave, or else the words "significant and substantial" would become mere surplusage. If the requisite danger flowed from the mere violation of a standard, then a closure could be issued under sections 104(c) and 104(b), where there is no danger requirement, on virtually the same basis. This result was clearly not intended by Congress.⁶⁰

The IBMA has recognized this policy recently in its decision in *Eastern Associated Coal Corporation*.⁶¹ There the IBMA held:

[The] conditions or practices subject to subsection 104(c) treatment . . . are restricted as befits the serious consequences of employing such strong enforcement tools Section 104(c) has within its ambit conditions or practices, constituting violations, which pose a probable risk of serious bodily harm or death⁶²

Clearly this standard of the danger potential, "a probable risk of serious bodily harm or death," is virtually indistinguishable from the degree and probability of danger within the ambit of the section 104(a) "death or serious physical harm."⁶³ This ruling, of course, does not thereby make the statutory abstraction any less obscure by simply equating it with another ephemeral concept.

⁶⁰ When a statutory scheme provides a sequence of enforcement measures which establishes a gradation in penalties or other consequences, the interpretation of the statute should recognize and preserve the distinction within the sequence. Otherwise, the legislative intent to provide a progressive enforcement scheme would be defeated. See *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n.*, 2 Occupational Safety & Health Cases 1283, *opinion vacated upon granting of motion for rehearing en banc*, *id.* at 1445 (3d Cir. 1974). There the court stated:

We believe that a restrictive definition is appropriate here since otherwise there would be no distinction between a "serious" offense and a "willful" one. The lack of demarcation would permit the agency to assess a higher penalty than that which is authorized for conduct defined as a "serious" violation. A broad interpretation of "willful" would disrupt the gradations of penalties and violations so carefully provided in the Act.

Id. at 1289.

⁶¹ 3 IBMA 331, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 (1974).

⁶² *Id.* at 349, 1974-1975 CCH Occupational Safety & Health Dec. at 22,602.

⁶³ 30 U.S.C. § 802(j) (1970). See also 33-35 *supra* and accompanying text.

In *Eastern Associated* the IBMA found that the operator had disregarded its roof control plan by not installing sufficient posts in a pillar area. There was no imminent danger because it did not appear likely that the roof might fall at the moment the closure was issued. However, there was a probable risk of a roof collapse because of the lack of props and the history of bad top in this area of the mine.⁶⁴ Significantly, the IBMA did not rely exclusively on the violation itself to support a finding of a probable risk of serious injury or death, but emphasized additional considerations that would exacerbate the violation.

That a violation of a mandatory standard alone will generally not satisfy the gravity requirements of section 104(c) is shown by the recent IBMA decision of *Zeigler Coal Co.*⁶⁵ There the inspector noted accumulations of several hundred feet of loose coal and coal dust ranging in depth up to eighteen inches. In vacating a section 104(c)(1) withdrawal order, the IBMA noted that the inspector had testified that the cited conditions "did not pose a grave threat to life and limb"⁶⁶

While these recent interpretations by the IBMA of the "significant and substantial" contribution language in section 104(c) reflect a proper recognition in theory of the high threshold of danger that must be crossed before the section may be invoked, that does not mean there will be a proper application in every case. Indeed, administrative law judges and the IBMA have shown a ready acceptance of an inspector's judgment that the gravity standard has been met. It is clear, however, that the case-by-case application of the gravity standard must respect the distinctions in danger levels imposed by the statutory scheme, thereby confining section 104(c) to a small class of violations which, but for a lack of imminence, would be serious enough to be classified as imminent dangers.

B. Unwarrantable Failure

In addition to a finding that the violation of a mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, there must be an additional determination that the violation was caused by an

⁶⁴ 3 IBMA at 336-37, 354-55, 1974-1975 CCH Occupational Safety & Health Dec. at 22,600, 22,604.

⁶⁵ 3 IBMA 448, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,131 (1974).

⁶⁶ *Id.* at 461, 1974-1975 CCH Occupational Safety & Health Dec. at 22,855.

“unwarrantable failure” of the operator to comply with the standard.⁶⁷ An “unwarrantable failure” has been defined by the IBMA as an intentional or knowing failure to comply with the standard cited or a reckless disregard for the health or safety of miners.⁶⁸

There is no indication in the legislative history why Congress did not express the standard in common law negligence terms, that would be more readily familiar. The House Conference Report prepared by the managers of the bill recited that an

“unwarrantable failure of the operator to comply” means the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care, on the operator’s part.⁶⁹

These varying pronouncements on the meaning of an “unwarrantable failure” have spawned a morass of competing definitions. The House managers’ definition is consistent with a standard of simple or ordinary negligence. Yet, the IBMA has variously defined the term as a standard of negligence greater than ordinary negligence, but short of willfulness,⁷⁰ and approaching recklessness. By holding that ordinary negligence was not equivalent to an unwarrantable failure,⁷¹ the IBMA has determined properly that section 104(c) should not be used where the operator has simply failed to exercise reasonable care to prevent a violation or abate one that it knew or should have known existed.⁷² This is again a recognition that such a strong enforcement tool should not be routinely utilized.⁷³

In *Eastern Associated Coal Corp.*⁷⁴ the IBMA held that the

⁶⁷ 30 U.S.C. § 814(c) (1970).

⁶⁸ *Eastern Associated Coal Corp.*, 3 IBMA 331, 356, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 at 22,604 (1974).

⁶⁹ LEGISLATIVE HISTORY 1030.

⁷⁰ The meaning of “unwarrantable failure” must be construed as somewhere short of willfulness or intentional disregard, since such conduct would render an operator or his agent liable for criminal penalties. 30 U.S.C. § 819(b) (1970). To interpret “unwarrantable” as consistent with willful would defeat the progressive sanctions of the Act. *See* authority cited in note 60 *supra*.

⁷¹ 3 IBMA at 349-50, 1974-1975 CCH Occupational Safety & Health Dec. at 22,602.

⁷² Compare *id.* with 30 C.F.R. § 100.3(d)(3) (1974).

⁷³ *See* 3 IBMA at 349, 1974-1975 CCH Occupational Safety & Health Dec. at 22,602.

⁷⁴ 3 IBMA 331, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 (1974).

operator had unwarrantably failed to comply with the mandatory roof support standard. The evidence indicated that the roof control plan adopted by Eastern had been disregarded in the affected area for three shifts or more. Since an area where active coal production is taking place would always have a face foreman present and in charge, the operator, through its agent, would clearly be aware of the noncompliance. The history of bad top conditions in the section would impart enough urgency that noncompliance for three shifts would be more than ordinary negligence.

A contrary result, however, was reached in *Freeman Coal Mining Co.*⁷⁵ Freeman was cited for accumulations of loose coal and coal dust for several hundred feet along a shuttle car roadway. MESA argued that there had been an unwarrantable failure to comply because Freeman had been warned by MESA that a cyclical clean-up was required as mining progressed, and not only on idle shifts. Secondly, knowledge of the expected standard of care was allegedly furnished by issuance of a section 104(b) notice two days before. Finally, MESA argued that the operator had actual knowledge of the condition because it was readily observable.⁷⁶

The IBMA held, however, that there was no unwarrantable failure to comply.⁷⁷ First, neither the Act nor the regulations required a clean-up within a specified frequency. It was thus implied that the duty of care is related to abatement performance measured against the urgency for abatement created by the cited conditions. Because Freeman had a regular and apparently frequent clean-up program, the IBMA stated that the operator showed a sustained clean-up effort and a definite regard for the health and safety of miners.⁷⁸

Significantly, the IBMA rejected the notion that prior violations indicated that the subject violation was the result of a disregard for safety. A prior history of compliance or noncompliance is not probative of the conduct of the operator in any subsequent case. It should also be noted, with a raised eyebrow, that this argument by MESA runs directly counter to their own published guidelines that were provided to both inspectors and operators: "It must be remembered the mere fact that the violation is one that

⁷⁵ 3 IBMA 434, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,177 (1974).

⁷⁶ *Id.* at 439, 1974-1975 CCH Occupational Safety & Health Dec. at 22,931.

⁷⁷ *Id.* at 441, 1974-1975 CCH Occupational Safety & Health Dec. at 22,932.

⁷⁸ *Id.* at 440-41, 1974-1975 CCH Occupational Safety & Health Dec. at 22,932.

has been observed repeatedly is not reason to assume that this is unwarrantable failure on the part of operator.”⁷⁹

Finally, the IBMA held in *Freeman* that the mere fact that the conditions were readily observable would not “by itself [be] sufficient to support a conclusion of recklessness, that is, a conscious disregard constituting a gross deviation from the legislated standard of care.”⁸⁰ Such a pronouncement is dramatic in effect because it establishes that even when the operator has actual knowledge of a violation, the failure to abate will not constitute an unwarrantable failure without an additional showing of recklessness. Such a showing, presumably, would require proof that the dangers created by the cited condition were extreme and reasonably proximate, although not imminent.

A corollary to the announced standard in *Freeman* and *Eastern Associated*, which amounts to gross negligence or recklessness, is demonstrated by the case where the operator had neither actual nor constructive knowledge of the conditions constituting a violation. Under traditional tort law analysis, which is relevant to the IBMA’s conception of unwarrantable failure, the standard of care or duty imposed upon the operator is unaffected by his awareness of the violation. However, whether that duty was breached, that is, whether there was “recklessness” or a “gross deviation” from the proper standard of care, is intimately related to knowledge of the violation. Thus, when the operator did not know, actually or constructively, of dangerous conditions, there can be no unwarrantable failure.

This conclusion is unaffected by the fact that the Act places the primary responsibility for safety upon operators. The Act clearly does not require the operator to be an insurer of its employees’ safety, nor does it impose strict liability. Therefore, the operator is only required to take reasonable precautions to examine for unsafe conditions. This standard for constructive knowledge is properly viewed as a function of state and federal laws and regulations. For instance, if the applicable laws and regulations require that a belt line be inspected once per shift by a certified person, and again during a pre-shift inspection, the operator should be entitled to rely on the reports of these inspections, since the per-

⁷⁹ Letter from John W. Crawford, Acting Assistant Director, Bureau of Mines, Department of the Interior, to all coal mine operators, Nov. 20, 1971.

⁸⁰ 3 IBMA at 442-43, 1974-1975 CCH Occupational Safety & Health Dec. at 22,932 (emphasis in original).

sons assigned this duty are invariably certified by state or federal law.⁸¹

A similar situation was recently considered by the IBMA in *Valley Camp Coal Co.*⁸² There the operator sought to have a penalty assessment reduced by contending that it was not negligent in permitting certain accumulations of loose coal and coal dust to develop. The operator argued that it had relied on the pre-shift examination report filed pursuant to West Virginia law, which showed no violations of state or federal law. The IBMA found that Valley Camp did not rely on the report but rather on an independent inspection by its foreman. Thus, the operator knew or should have known of the condition.⁸³

However, in dictum, the IBMA stated:

We are further in agreement with MESA that even if the operator had so relied, it was not the legislative intent to permit him to exculpate himself of the high degree of care imposed upon him under the Act by relying upon a report made pursuant to State law by a person not directly responsible to him. The Act places primary responsibility for the health and safety of miners upon the operator.⁸⁴

Naturally, the operator may not abdicate its responsibilities under the Act, but a reliance on a state examiner's report is not such an abdication, since the examiner is required to report to the operator in much the same fashion as is the foreman. *Valley Camp* must be confined to its own facts. There the operator's foreman was required to conduct his own examination. Thus, if the operator was not under a duty to examine a particular area during the time when the hazardous conditions developed, and the pre-shift reports disclosed no violation, there cannot be any finding of negligence, let alone recklessness, amounting to unwarrantable failure.

In summary, the IBMA has properly defined in theory the scope and nature of unwarrantable failure. Its decision confines the availability of section 104(c) to a narrow class of cases where the operator's conduct is in reckless disregard for safety. Any lower standard would permit an even more wholesale use of section 104(c) in contravention of congressional intent.

⁸¹ See, e.g., 30 C.F.R. §§ 75.303-04 (1974).

⁸² 3 IBMA 463, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,132 (1974).

⁸³ *Id.* at 469-70, 1974-1975 CCH Occupational Safety & Health Dec. at 22,857.

⁸⁴ *Id.* at 470, 1974-1975 CCH Occupational Safety & Health Dec. at 22,857.

C. "An Inspection": The Art of Making "Words Mean So Many Different Things"

"When I used a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more or less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "[who] is to be master—that is all."⁸⁵

As demonstrated, section 104(c) of the Act establishes a progression of notices and orders—the "C series."⁸⁶ Whether a notice or order is issued under either sections 104(c)(1) or 104(c)(2) turns primarily on when, during the series, a violation of a mandatory safety or health standard is found. For instance, when a violation of a mandatory health or safety standard is found during an inspection within ninety days of the issuance of a section 104(c)(1) notice, a section 104(c)(1) order must be served.⁸⁷ Thereafter, and until there has been an inspection of the mine disclosing no similar violations, the so-called "clean inspection," a section 104(c)(2) order will issue.⁸⁸

The "C series" thus threatens the operator with summary curtailment of his mining operations for repeated or habitual violations of the mandatory safety or health standards.⁸⁹ At the same time, the Act recognizes that there will be occasional violations even by the conscientious operator and thus does not impose the severe closure penalty.⁹⁰ Instead it permits the continuation of mining when no violation is discovered during the three-month

⁸⁵ L. CARROLL, *THROUGH THE LOOKING GLASS* 186 (1906).

⁸⁶ See notes 24-27 *supra* and accompanying text.

⁸⁷ 30 U.S.C. § 814(c)(1) (1970). For such an order to issue, of course, there must also be independent findings by the MESA inspector that the violation was caused by an unwarrantable failure to comply with the mandatory standard and that the conditions cited were such that they could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. *Id.*

⁸⁸ 30 U.S.C. § 814(c)(2) (1970).

⁸⁹ *Eastern Associated Coal Corp.*, 3 IBMA 331, 358 1974-1975 OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 18,706 (1974); *Eastern Associated Coal Corp.*, Docket No. HOPE 73-200, at 14 (Feb. 26, 1974); *Clinchfield Coal Co.*, Docket No. NORT 72-39, at 17 (Jan. 23, 1974); *Clinchfield Coal Co.*, Docket No. NORT 72-9, at 16 (Jan. 23, 1974).

⁹⁰ See *Wheeler & Snow, Proposals for Administrative Action Under the Federal Coal Mine Health and Safety Act of 1969*, 3 NAT. RES. LAW 248, 250 (1970).

probation period following the issuance of a section 104(c)(1) notice or when the mine is brought into compliance after the issuance of a section 104(c)(1) or (c)(2) order.

MESA, however, has interpreted the Act in such a way as to eliminate and defeat the congressional mandate affording the conscientious operator a measure of consideration not extended to his more recalcitrant counterpart. This has been accomplished by defining the term "inspection" in such a way that the operator can be prevented from ever having a "clean inspection" following the issuance of a section 104(c)(1) order. Thus, the threat of a section 104(c)(2) closure can remain perpetually over the head of the operator. We have seen, for instance, countless cases where a section 104(c)(2) order has been based on a section 104(c)(1) order that was issued more than one year previous.

The bastardization of the congressional intent in establishing the "C series" was accomplished by interpreting "an inspection" of a mine as a series of spot safety and health inspections conducted in rapid succession and covering the entire mine.⁹¹ MESA refers to this as a "complete" or "regular" inspection,⁹² a term and concept that nowhere appear in the Act. Before there can be a "clean inspection" which removes the availability of the section 104(c)(2) closure order, MESA argues that there must be a complete or regular inspection, often covering several weeks or months, during which there must be no violations cited. Because most large and moderate-sized mines will be inspected almost daily, it is virtually impossible for an operation, even one making a maximum effort, to remain totally in compliance over a period of several weeks. Thus, the section 104(c)(2) order, which was not intended by Congress to be a routinely issued process, but a severe and costly lesson to the recalcitrant operator, threatens to become almost commonplace for moderate and large-sized mines.⁹³

⁹¹ See authorities cited in note 89 *supra*; U.S. DEP'T OF INTERIOR, MESA, COAL MINE SAFETY INSPECTION MANUAL FOR UNDERGROUND MINES § 1.5 (1971); *Id.* (1973).

⁹² See authorities cited in note 91 *supra*. The concept "regular" or "complete" inspection is apparently derived from section 103(a) of the Act which requires that each coal mine be inspected in its entirety at least four times annually. 30 U.S.C. § 813(a) (1970).

⁹³ From 1970 through 1972, MESA inspectors issued 1,249 withdrawal orders under sections 104(c)(1) and (c)(2) of the Act alone. U.S. DEP'T OF INTERIOR, ADMINISTRATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT, tables A-3 to A-5, at 70-87 (1973); U.S. DEP'T OF INTERIOR, MOVING FORWARD IN COAL MINE HEALTH AND SAFETY, table 7, at 65 (1972); U.S. DEP'T OF INTERIOR, TOWARDS IMPROVED HEALTH

MESA has also used its interpretation of “inspection” to effect routine closures of all or part of a mine pursuant to section 104(c)(1). MESA’s general inspection program to determine compliance with the mandatory safety standards provides that each regular inspection be followed by a brief period of random spot inspections before a new regular inspection is initiated. When a section 104(c)(1) notice has been issued, a section 104(c)(1) order must be issued within ninety days or not at all. However, MESA has advanced the position in at least some cases,⁹⁴ that if the section 104(c)(1) order is issued during a regular inspection, then such orders may be repeatedly issued during the remainder of the period before the next regular inspection begins, without regard to the command of section 104(c)(1) that such orders may only be issued once and only during a period “within ninety days after the issuance of [the section 104(c)(1)] notice”⁹⁵ Such an interpretation again has the effect of authorizing closures in non-emergency situations as a routine matter in utter disregard for the congressional intent.

MESA’s interpretation of “inspection,” which permits it to exercise leverage unanticipated and unintended by Congress, is not only ludicrous on its face and violative of every canon of statutory interpretation and common sense, but it is also violative of regulations promulgated by the Secretary of the Interior.

The Federal Coal Mine Health and Safety Act of 1969 was not, of course, the first congressional attempt to provide safe working conditions for the American coal miner.⁹⁶ The Act replaced the Federal Coal Mine Safety Act of 1952.⁹⁷ The enforcement scheme

AND SAFETY FOR AMERICA’S COAL MINERS, tables 7-8, at 31-32 (1971). While the number of such orders seems relatively small, equalling only about two-thirds of the average number of active underground mines during that period, only a relatively few mines were singled out for such closures. Moreover, the average period of closure for all orders issued during 1970 was more than eight days. TOWARDS IMPROVED HEALTH AND SAFETY, *supra* table 9, at 32.

While the average number of sections 104(c)(1) and (c)(2) orders issued annually from 1970-72 was just over four hundred, there appears to be a marked accelerating trend. In 1973-74, for which no system-wide data is yet published, there were seventy sections 104(c)(1) and (c)(2) closure orders issued to one southern Illinois coal operator alone who operates just three mines.

⁹⁴ Old Ben Coal Co., Docket Nos. VINC 75-267; VINC 75-269; VINC 75-270; VINC 75-271; VINC 75-273 (decisions pending).

⁹⁵ 30 U.S.C. § 814(c)(1) (1970).

⁹⁶ See authorities cited in notes 1-4 *supra* and accompanying text.

⁹⁷ Act of July 16, 1952, 66 Stat. 710 (codified at 30 U.S.C. §§ 451-58 (1970)).

of the 1952 Act was virtually identical to that of its successor and clearly furnished the pattern for section 104 of the current Act. Section 203 of the 1952 Act, as amended,⁹⁸ the analogue of section 104 of the 1969 Act, provided at subsection (d)(2):

If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, *thereafter* a withdrawal order shall promptly be issued by a *duly* authorized representative of the *Bureau* who finds upon any *following* inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations, following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine.⁹⁹

The only differences between the above-quoted section and section 104(c)(2) of the 1969 Act are emphasized. The lack of substantive changes demonstrates that Congress obviously intended to adopt and continue the enforcement mode established by section 203(d)(2), and thus its interpretations, when section 104(c)(2) was enacted in 1969. This conclusion follows from the fact, among other things, that the 1952 and 1969 Acts are *in pari materia*: statutes dealing with the same subject matter.¹⁰⁰ The rule of construction applicable in this context is well-defined:

[W]ords or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense. It has been said that, "the need for uniformity becomes more imperative where the same word or term is used in different statutory sections that are similar in purpose and content"¹⁰¹

As in the 1969 Act, Congress in the 1952 Act also authorized the Director of the Bureau of Mines to conduct inspections to determine whether there was an imminent danger and whether the operators were complying with the mine safety standards of the Act. This authorization, section 202(a) of the 1952 Act, provided in pertinent part:

⁹⁸ Act of Mar. 26, 1966, Pub. L. No. 89-376, 80 Stat. 84, at 85.

⁹⁹ *Id.* § 3(a) (codified at 30 U.S.C. § 473(d)(2) (1970)) (emphasis supplied).

¹⁰⁰ 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 51.01, at 287 (4th ed. 1973).

¹⁰¹ *Id.* § 51.02, at 290, quoting *Commissioner v. Estate of Ridgway*, 291 F.2d 257 (3d Cir. 1961). See also *Marks v. United States*, 161 U.S. 297 (1896).

For the purpose of determining whether a danger described in section 203(a) [imminent danger] exists in any mine . . . or whether any provision of section 209 [safety standards] is being violated in any such mine, . . . the Director shall cause an inspection of each such mine to be made by a duly authorized representative of the Bureau at least annually. The Director shall also make, or cause duly authorized representatives to make, such special inspections of such mines as may be required by section 203(c) and section 206¹⁰²

This statutory authorization of inspections in the 1952 Act was adopted by the Director and published as a regulation.¹⁰³ Concurrently therewith, the Director published an interpretive regulation of the term "an inspection" as used in the 1952 Act:

*An inspection shall be considered as completed when the inspector reaches the surface of the mine during or after the shift on which he first entered the mine. When the inspector goes in the mine on a shift other than the one on which he came out of the mine the work he performs on the later shift shall be considered another inspection.*¹⁰⁴

There can be no doubt that the meaning of the word "inspection" in the 1952 Act, as it related to enforcement of the imminent danger and safety standard provisions of the Act, was that each separate trip underground was "an inspection." Considering the virtual identity of section 203(d)(2) of the 1952 Act and section 104(c)(2) of the 1969 Act, there also can be no doubt that Congress intended that each trip by an inspector underground to implement the progressive steps of the "C series" would also be an "inspection" within the meaning of the 1969 Act.

Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is reenacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law

The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpre-

¹⁰² 30 U.S.C. § 472(a) (1970).

¹⁰³ 34 Fed. Reg. 1134 (1969) (codified at 30 C.F.R. § 45.2 (1970)).

¹⁰⁴ 34 Fed. Reg. 1134 (1969) (codified at 30 C.F.R. § 45.2-1 (1970)) (emphasis supplied).

tation upon reenactment.¹⁰⁵

Thus, subsequent to the issuance of any section 104(c)(1) order, if an inspector goes underground for any authorized purpose and finds no violations similar to that which precipitated the 104(c)(1) order, there has been a "clean inspection" which renders inapplicable at that time the provisions of section 104(c)(2).

However, as compelling and dispositive of the issue as the above historical analysis is, there is an even more cogent reason for holding that "an inspection" means any separate underground visit. The interpretive regulation defining "inspection" was in force and had legal effect for four and one-half years following the passage of the 1969 Act. While the Secretary of Interior has since revoked this regulation,¹⁰⁶ such revocation has instituted without any authorizing amendments to the Act by Congress. Section 101(j) of the Act¹⁰⁷ provided for the transition from and the continuity with the 1952 Act as follows:

All interpretations, regulations, and instructions of the Secretary or the Director of the Bureau of Mines, in effect on

¹⁰⁵ C. SANDS, *supra* note 100, § 49.09, at 256-57.

The House version of the Act that was presented to the Conference Committee defined an "inspection" as ". . . the period beginning when an authorized representative of the Secretary first enters a coal mine and ending when he leaves the coal mine during or after the coal-producing shift in which he entered" LEGISLATIVE HISTORY 770. This provision was offered by Rep. Perkins, the chairman of the House Committee on Education and Labor, as a *technical* amendment suggested by the *Bureau of Mines*. *Id.* 769.

The purpose of this definition is made clear from the House version of the bill. The House had proposed that following the issuance of what is now a section 104(c)(1) notice, the mine be reinspected to determine if a similar violation existed. If this reinspection, or an inspection under any other section, discovered a similar violation, then a section 104(c)(1) order must be issued. H.R. REP. NO. 91-563, 91st Cong., 1st Sess. 31 (1969). Clearly, the House intended a probation period to be accorded the operator before an order was issued.

However, the Senate version provided for the issuance of a section 104(c)(1) order during the same or a subsequent inspection. Thus, there was no longer any need to define when an inspection began or ended, and the definition was eliminated at the House-Senate Conference and in the final bill that passed Congress. LEGISLATIVE HISTORY 1025.

At no time did Congress discuss or consider a definition or concept of "inspection" different from that quoted above. MESA and the IBMA have created their "regular" inspection concept from whole cloth.

¹⁰⁶ Subchapter L of Title 30 of the Code of Federal Regulations, which included section 45.2-1, was revoked by the Secretary of Interior through his deputy assistant, effective July 1, 1974. 39 Fed. Reg. 23996-97 (1974).

¹⁰⁷ 30 U.S.C. § 811(j) (1970).

the date of enactment of this Act and not inconsistent with any provisions of this Act, shall be published in the Federal Register and *shall continue in effect* until modified or superseded in accordance with the provisions of this Act.¹⁰⁸

One of the “interpretations, regulations, and instructions” effective on the date of the enactment of the 1969 Act was the above provision defining “an inspection.” That provision was re-published in the Code of Federal Regulations in 1970,¹⁰⁹ and thereafter annually¹¹⁰ until it was revoked in 1974.¹¹¹ Such publication and republication in the Code of Federal Regulations satisfies the requirement of section 101(j) of the Act that those provisions under the 1952 Act that were consistent with the 1969 Act shall be published in the Federal Register. The Code of Federal Regulations is a special edition of the Federal Register officially collecting and codifying those administrative regulations published from time to time in daily editions of the Federal Register. All items published in the Federal Register and collected and codified in the Code of Federal Regulations have “general applicability and legal effect, . . . and are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions”¹¹² Moreover, federal law requires that such items be judicially noticed.¹¹³

The inescapable conclusion from the foregoing is that from

¹⁰⁸ *Id.* (emphasis supplied).

¹⁰⁹ 30 C.F.R., subch. L, at 218 (1970).

¹¹⁰ *Id.* at 260 (1971); *id.* at 223 (1972); *id.* at 237 (1973).

¹¹¹ See authorities cited in note 106 *supra*.

¹¹² 44 U.S.C. § 1510 (1970). MESA has contended that the appearance of this regulation in the Code of Federal Regulations does not constitute publication in the Federal Register. Old Ben Coal Co., Docket Nos. VINC 74-97 (decision pending). This is indeed a strange position for a governmental agency to take, but strange or not, it is without merit. The United States Court of Appeals for the District of Columbia held in *Sheridan-Wyoming Coal Co. v. Krug*, 172 F.2d 282 (D.C. Cir. 1949), at the insistence of the Department of the Interior it might be added, that the required publication of a mineral leasing regulation in the Federal Register was accomplished by its inclusion in the Code of Federal Regulations. *Id.* at 85. Furthermore, the regulation whose publication was therein contested, Circular 1318, Feb. 1, 1934, 54 L.D. 352, was promulgated in 1934, before the daily issues of the Federal Register were provided for by Congress in the Federal Register Act, 44 U.S.C. §§ 1501 *et seq.* (1970). Thus, the regulation at issue in *Krug*, as with 30 C.F.R. § 45.2-1, never appeared (at a relevant time) in an actual daily issue of the Federal Register. The publication of these regulations in the Federal Register was effectuated solely by their appearance in the Code of Federal Regulations.

¹¹³ 44 U.S.C. § 1507 (1970).

both an analysis of the legislative intent and the clear mandate of the Secretary of Interior as unambiguously expressed in the Code of Federal Regulations, a clean “inspection” within the meaning of section 104(c)(2) of the Act results whenever an authorized representative of the Secretary has occasion to lawfully enter a coal mine subject to the Act and emerges therefrom without having cited the operator for a violation similar to the one prompting the underlying section 104(c)(1) order.

While the foregoing analysis more than adequately demonstrates the proper construction of the term “an inspection” as used in section 104(c), a review of the statutory language itself reveals MESA’s tortured and artificial interpretation. The word “an” is commonly used in connection with a noun beginning with a vowel to mean “one” or “any.” MESA does not examine the entirety of any reasonably large mine on a single inspection but rather fulfills the requirements of section 103(a) by a series or group of inspections conducted over a period of days or weeks. This series is, in no real sense, “one” inspection or “any” inspection. Further, the words “such mine,” when used as in the clause in question, mean merely the mine to which reference has already been made. They contain no explicit or implicit reference to the entirety of that mine. The words of the statute will simply not support this definition as proposed by MESA.

Secondly, the words “an inspection of such mine” should not be considered in a vacuum.¹¹⁴ These words, when considered in the context of the remainder of section 104 and other related sections of the Act, clearly indicate the erroneous nature of the definition followed by MESA. For instance, section 104(c)(1) provides for the issuance of a section 104(c)(1) order of withdrawal if a violation similar to that alleged in the prior section 104(c)(1) notice is discovered during “the same inspection of any *subsequent inspection* of such mine” within ninety days after issuance of the notice.¹¹⁵ MESA, however, has never contended that these words restrict section 104(c)(1) such that the issuance of a notice or order under that section could only occur during a formal series of spot health and safety inspections intended to cover the entire mine. MESA inspectors issue notices and orders under section 104(c)(1) without regard to whether a regular inspection is in progress. In addition, if MESA’s interpretation were to be followed, a section 104(c)(2)

¹¹⁴ See authorities cited in notes 101-08 *supra* and accompanying text.

¹¹⁵ 30 U.S.C. § 814(c)(1) (1970) (emphasis added).

order could not be issued until the next “regular inspection” were begun following the issuance of a section 104(c)(1) order. This period might range up to several months where section 104(c)(2) would be inapplicable. Moreover, the interpretation offered by MESA would prohibit issuance of a section 104(a) order for imminent danger except during a “regular” or “complete” inspection, since this order may also be issued only “upon any inspection.”

MESA has thus defined equivalent language in different fashions dependent merely upon which definition suits its particular purposes. The United States Court of Appeals for the Third Circuit capsulized a contrary and certainly more cogent rule of construction when it said in *Commissioner of Internal Revenue v. Estate of Ridgway*:¹¹⁶

Where a word or phrase is used in different parts of the same statute, it will be presumed to have the same meaning throughout. *The need for uniformity becomes more imperative* where the same word or term is used in different statutory sections that are similar in purpose and content, or *where, as here, a word is used more than once in the same section.*¹¹⁷

The language of section 103(a)¹¹⁸ also demonstrates the appropriate definition for the words “an inspection of such mine.” In the last sentence of that section, the examination of the mine required at least four times annually is described as an inspection “of the entire mine.”¹¹⁹ When Congress wished to require an inspection of the complete mine as a condition of liability on the satisfaction of a statutory duty, it did so in a clear and lucid fashion. MESA is attempting to read similar language into section 104(c)(2) even though the language has not been provided by Congress. Had Congress wished to require an inspection of the entire mine as a formal requirement for the transition from one level of the “C series” to another, it could have and would have made this intent clear. Its failure to provide such a qualification should not be rendered meaningless by allowing MESA to wish these omitted words into the statute. After all, MESA’s authority to administer the Act does not encompass the power to re-draft it to consolidate or expand its institutional leverage over the operators.¹²⁰

¹¹⁶ 291 F.2d 257 (3d Cir. 1961).

¹¹⁷ *Id.* at 259 (emphasis added) (citations omitted).

¹¹⁸ 30 U.S.C. § 813(a) (1970).

¹¹⁹ *Id.* (emphasis added).

¹²⁰ The number of possible examples of why MESA’s interpretation of “an inspection” is erroneous is limited only by the rules of mathematical probability. For

The question of what constitutes "an inspection" in the context of the "C series" has been considered numerous times by the IBMA and individual administrative law judges,¹²¹ and the IBMA has adopted MESA's position. An analysis of those decisions clearly indicates that the results are wholly political, in that there is no plausible legal basis for the decisions, but only an expressed concern that the operator will be able to avoid section 104(c)(2) closure orders unless a longer period of time is permitted in which to invoke liability. The difficulty with the rationale that operators should not be able to so easily escape section 104(c)(2) liability is that Congress did not intend such liability to be routinely invoked. After all, the fifth amendment forbids seizure of property without notice and hearing when there is admittedly no emergency or compelling reason requiring such seizure.¹²² Moreover, MESA should not be permitted to maintain the availability of a section 104(c)(2) closure order for a year or more by citing an underlying section 104(c)(1) order that is virtually decomposing with age. This is not a hypothetical situation. It is a common occurrence in large coal mines. The inspection policies of MESA and the IBMA, we are convinced, are designed and executed to maintain continuously the availability of the threat of routine closure orders when no emergency exists.

V. THE BURDEN OF PROOF IN THE ADMINISTRATIVE REVIEW PROCESS: STACKING THE DECK

Section 105 of the Act¹²³ provides that an operator or representative of the miners affected by a notice of violation or a closure order may apply for an administrative review of the issuance of the order pursuant to the hearing procedures established by the regulations.¹²⁴ This quasi-judicial proceeding is designed to provide a

instance, another perfectly delightful example can be found in section 103(h) of the Act. 30 U.S.C. § 813(h) (1970). That section provides that an authorized representative of the miners must be given the opportunity to accompany the inspector "on such inspection." Yet interpreting "inspection" the way MESA proposes causes some difficulty. To afford the miners' representative to go along on "such inspection," that is, a series of spot safety and health inspections in rapid succession without interruption that covers the entire mine, some notice must be given him that this series is beginning. However, section 103(a) specifically provides that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. 813(a) (1970) (emphasis supplied).

¹²¹ See, e.g., authorities cited in note 89 *supra*.

¹²² See authorities cited in notes 137-60 *infra* and accompanying text.

¹²³ 30 U.S.C. § 815 (1970).

¹²⁴ 43 C.F.R. §§ 4.500-4.605 (1974).

safeguard against abuses of discretion by MESA inspectors, thereby minimizing the unfair and potentially massive economic dislocation inherent in wrongfully issued summary closure orders.¹²⁵ However, because the review follows the issuance of the closure order, when the economic damage from a closure order has already been suffered, the right to an administrative review is, at best, a long-term measure to ensure the lawful and judicious use of closure orders.¹²⁶

The administrative review proceedings are, of course, important for ensuring that in individual instances the initial exercise of enforcement discretion by MESA inspectors will properly adhere to the intent of Congress and respect the rights of the operators, the miners, and the public. These proceedings, however, are even more significant as a vehicle for providing a practical, interpretive framework for the Act, that is, in developing and maintaining, in accordance with congressional guidelines, a reasonable balance among the sometimes competing interests of the miners, the operators, and the public. The attainment of this balance, however, has been repeatedly thwarted by the burden of proof rules that exempt MESA from having to justify its inspectors' exercises of discretion. Consequently, the opportunity for an effective review of administrative action is frequently frustrated, and, with it, the built-in safeguard to ensure the proper effectuation of the Act and the protection of the rights of all concerned parties.

The burden of proof in administrative reviews is governed by regulations of the Secretary of Interior:

In proceedings brought under the Act, the applicant, petitioner or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence

¹²⁵ See Wheeler & Snow, *supra* note 90, at 250.

¹²⁶ As a practical matter, the use of the review proceeding can validly be seen as a privately financed program by the industry to train and educate mine inspectors in the proper performance of their duties. This was especially true in the first two years of the Act's operation when the inspection staff was greatly expanded, virtually overnight. Because the Interior Department had difficulty in recruiting inspectors, it had to lower its standards and accept what many management personnel considered the least qualified persons in the industry for the position. Time and again we have seen inspectors who are very much aware of instructions from their supervisors, but totally ignorant of the applicable regulations. See generally U.S. DEP'T OF INTERIOR, TOWARDS IMPROVED HEALTH AND SAFETY FOR AMERICA'S COAL MINERS § 17-23 (1971); Straton, *Effects of Safety Legislation on Productivity*, MINING CONGRESS JOURNAL, Aug., 1971, at 28.

provided that . . . wherever the violation of a mandatory health and safety standard is an issue [MESA] shall have the burden of proving the violation by a preponderance of the evidence.¹²⁷

Citing this provision as authority, the IBMA has held that when an imminent danger closure order is issued pursuant to section 104(a), the applicant for administrative review, the operator, must prove either that there was no danger or that the danger was not imminent.¹²⁸ When closure orders are issued pursuant to section 104(c), it would then follow that MESA must establish the threshold question of a violation of a mandatory standard. The operator, to prevail, must then prove the absence of an unwarrantable failure and that the conditions cited did not present a significant and substantial hazard.¹²⁹

By excusing MESA from preponderating with regard to all or most elements necessary to sustain a withdrawal order, the regulation has, without congressional authorization, created rebuttable presumptions of the propriety of the inspector's actions. Consequently, the regulation has converted certain ordinary defenses, arising from the facts upon which the closure order is based, into affirmative defenses that the applicant/operator must plead and prove by a preponderance of the evidence. As a practical matter, therefore, the inspector is accorded more leverage because the government need not be prepared to justify his exercises of discretion. The abuses of discretion thus engendered by thwarting an effective review of an order are many and significant.

While as a matter of policy the burden of proof should be assigned to MESA as to all elements of an order, the objections to the regulation, section 4.587, do not stop there. Section 4.587 was promulgated in direct violation of the Act and thus is *ultra vires*.

Section 105(a) of the Act provides that administrative review proceedings shall be conducted pursuant to the hearing provisions

¹²⁷ 43 C.F.R. § 4.587 (1974).

¹²⁸ See, e.g., *Freeman Coal Mining Corp.*, 2 IBMA 197, 208, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,567 at 21,394 (1973).

¹²⁹ However, things are not always what they seem. While administrative law judges have regularly been assigning the burden of proof to the applicant as to all issues except the violation of a mandatory standard, the IBMA has been chary of making so bold an assertion, undoubtedly because of the assertion by operators that this burden of proof regulation is invalid. See *Eastern Associated Coal Corp.*, 3 IBMA 331, 341-42, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 at 22,604 (1974), and authorities cited in notes 132-35 *infra* and accompanying text.

of the Administrative Procedure Act (APA).¹³⁰ Section 556(d) of the APA provides that “[e]xcept as otherwise provided by statute, the proponent of the rule or order has the burden of proof.”¹³¹

In three cases presently consolidated on appeal and pending before the United States Court of Appeals for the Seventh Circuit as *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*,¹³² the government has maintained that section 105(a) “specifically” invokes the exception clause of section 556(d) and provides that the burden of proof be borne by the operator in an administrative review proceeding.¹³³ This argument is alchemized from the language in section 105(a) that permits both the operator and the representative of the miners “to present information relating to the issuance and continuance of such order”¹³⁴ when either applies for a review of the closure order. If extension of this opportunity carries with it the burden of proof, then both the operator and the miners’ representative must prove their positions by a preponderance of the evidence. However, since the interests of these parties in review proceedings seldom, if ever, coincide, MESA’s suggested construction of section 105(a) would require the two parties to establish mutually exclusive conclusions by a preponderance of the evidence.

The remainder of MESA’s argument in *Old Ben Coal* as to why the operator must bear the burden of proof involves essentially the proposition that if MESA must prove its inspectors acted in accordance with the law, then mining will become more dangerous, and enforcement of the Act will be frustrated.¹³⁵ This argument breaks down of its own weight. Section 4.587, which assigns the burden of proof, provides the MESA must prove violations of man-

¹³⁰ 5 U.S.C. §§ 551-559 (1970). Section 105 of the Act states that review hearings shall be subject to section 554 of the APA which, in turn, provides that the actual conduct of the hearing be governed by section 556 of the APA. The IBMA has recognized the general applicability of section 556 to hearings under the Act. *Freeman Coal Mining Corp.*, 2 IBMA 197, 205, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,567 at 21,393 (1973).

¹³¹ 5 U.S.C. 1 556(d) (1970) (emphasis added).

¹³² Appeal Nos. 74-1654, 74-1655, 74-1656 (7th Cir., filed August 14, 1974).

¹³³ Brief for Respondents at 28, *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, *id.*

¹³⁴ 30 U.S.C. § 815 (a)(1) (1970).

¹³⁵ Brief for Respondents at 28-31, *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, *supra* note 132.

datory standards in review proceedings for closure orders issued pursuant to sections 104(b) and 104(c). If the relationship between section 4.587 of the regulations and section 105(a) of the Act is such that safety requires that the operator disprove an imminent danger, one might well ask why it is less dangerous to require that MESA preponderate when the conditions only create a "significant and substantial" danger.

Of course, section 105(a) only provides the right to a hearing; it does not purport, expressly or impliedly, to assign the burden of proof. There is no discussion of an intention to assign the burden to the applicant anywhere in the legislative history. Had Congress intended to allocate the burden of proof at variance with the assignment made by section 556(d) of the APA, it would have done so explicitly. For example, the provisions of the Act relating to eligibility for pneumoconiosis (black lung) benefits expressly alter the APA burden of proof standards by creating statutory presumptions.¹³⁶ MESA, in effect, has attempted to create presumptions concerning the validity of closure orders through section 105(a) when Congress has otherwise decreed.

This reassignment of the burden of proof by administrative fiat has worked an untold hardship on operators challenging abuses of enforcement discretion. It has virtually become a presumption behind which MESA can hide when an unjustifiable order has been issued. There is no question in the minds of those active in challenging improper withdrawal orders that the quality of enforcement performance would be very much different if the burden of proof were assigned where it belongs—upon MESA.

VI. THE CONSTITUTIONAL DIMENSIONS OF CLOSURE ORDERS

The area of inquiry that has received the least attention is the constitutionality of the Act's enforcement provisions.¹³⁷ Because closure orders under section 104 may be issued statutorily without prior notice or hearing, the question arises whether coal operators are being deprived of a property interest without due process of law under the fifth amendment to the Constitution.¹³⁸

¹³⁶ 30 U.S.C. 1 921(c) (1970).

¹³⁷ There currently are three cases consolidated on appeal before the Seventh Circuit charging that section 104(a) of the Act is unconstitutional as applied. *Old Ben Coal Corp.*, Appeal Nos. 74-1654, 74-1655, 74-1656 (7th Cir., filed Aug. 14, 1974).

¹³⁸ The Constitution provides that "no person shall . . . be deprived of . . .

Although extensive regulation of a business at substantial expense to its owner is commonplace and no longer raises serious constitutional questions, the summary administrative closure of a business or a seizure of property held for sale is recognized as a deprivation of a property interest that must be attended by sufficient procedural safeguards to satisfy the due process clause of the fifth amendment.¹³⁹ The extent of the procedural safeguards and the stage at which they must be afforded depends upon the urgency¹⁴⁰ of administrative action, the relative importance of the interest protected by closure or seizure, and the property interest impaired.¹⁴¹

Summary deprivations of liberty or property are, of course, not per se invalid. The United States Supreme Court enunciated ground rules for such seizures in the landmark consumer case, *Fuentes v. Shevin*.¹⁴²

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of

property without due process of law." U.S. CONST. amend. V.

¹³⁹ *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). See generally *U.S. v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970) (the right to pursue a lawful business is a "property right" subject to fifth amendment protection); Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

¹⁴⁰ Urgency relates to the proposition "that the legitimate interest of the party opposing the hearing might be defeated outright if such hearing were to be held." *Arnett v. Kennedy*, 416 U.S. 134, 188 (1974) (White, J., concurring in part and dissenting in part). Examples of decisions approving summary administrative action because of such urgency include *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (sequestration of property held subject to a debt when the possessor of the property could waste it); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (appointment of conservator of assets of a savings and loan association to prevent otherwise irreparable economic harm to the community); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (seizure of property as security for collection of a tax when property otherwise might be wasted); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (spoiled food that otherwise would have been sold on the market). See generally Freedman, *supra* note 139, at 1-20.

¹⁴¹ *Arnett v. Kennedy*, 416 U.S. 134, 155, 188 (1974).

In *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), the Supreme Court stated: "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* at 895.

¹⁴² 407 U.S. 67 (1972).

legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.¹⁴³

However, even where summary seizures have been held constitutionally permissible, the property owner must be afforded a hearing before the deprivation becomes final. Moreover, there are generally provisions for full compensation for any property loss if the deprivation is subsequently determined to be wrongful.¹⁴⁴ For example, in *North American Cold Storage Co. v. Chicago*,¹⁴⁵ the Supreme Court upheld a Chicago ordinance that permitted the seizure and destruction of allegedly tainted food without prior notice and hearing. The reasoning of the Court and the authorities cited in support of its decision make it very clear that the public interest in emergency situations outweighs the general right of prior notice and hearing. However, the right to a subsequent hearing may not be infringed by statute nor may the right of the property owner to recover his loss, if the actions by the inspectors are proved to have been unjustified.¹⁴⁶

The imminent danger closure provision in section 104(a) of the Act fits squarely within the well-established doctrine permitting summary governmental action when emergencies threaten health or safety. However, because such seizure without hearing may only be authorized under a narrowly drawn statute¹⁴⁷ and must be subsequently compensated if the deprivation is found to be unjustified,¹⁴⁸ it is clear that the validity of the section 104(a) closure authority must rest upon a narrow construction of the provision that confines its application to truly emergency conditions. As the earlier analysis of section 104(a) has demonstrated,¹⁴⁹ the provision is unquestionably valid on its face for the power it confers. However, the construction of "imminent" by the IBMA has removed the congressional and constitutional constraints that such summary closure be invoked only in true emergencies when delay could be fatal.

¹⁴³ *Id.* at 91.

¹⁴⁴ *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Ewing v. Mattinger & Casselberry Co.*, 339 U.S. 594, 599-600 (1950). See generally Freedman, *supra* note 139; Note, *Changing Concepts of Consumer Due Process in the Supreme Court—The New Conservative Majority Bids Farewell to Fuentes*, 60 IOWA L. REV. 262 (1974).

¹⁴⁵ 211 U.S. 306 (1908).

¹⁴⁶ 211 U.S. at 315-21.

¹⁴⁷ *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

¹⁴⁸ See 211 U.S. at 315-21.

¹⁴⁹ See authorities cited in notes 28-54 *supra* and accompanying text.

Sections 104(b) and 104(c) authorize closure under conditions where there is an express disavowal of an imminent danger. The section 104(b) closure order is issued to compel more rapid compliance with the mandatory safety and health standards.¹⁵⁰ Closure orders issued pursuant to section 104(c) are also characterized by the absence of an emergency. Moreover, the closure is provided solely to punish recalcitrant operators whose history of compliance involves an element of reckless disregard for safety.¹⁵¹ While compelling compliance with safety and health standards is indeed a matter of serious public concern, the lack of urgency on a case-by-case basis undermines the validity of summary closure as a proper means. Clearly, the long-run interest in forcing compliance can be equally well served by the imposition of monetary penalties following full hearing. Such an approach would provide miners with effective protection of their interest in safety without prejudicing the constitutional rights of the operators.

The Supreme Court has ruled that governmental action that is less restrictive of constitutional rights must be employed when there is no emergency justifying summary action. In *Bell v. Burson*,¹⁵² the Court held that “it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford ‘notice and opportunity for hearing’ . . . before the termination becomes effective.”¹⁵³ Thus, it is clear that sections 104(b) and 104(c) are constitutionally deficient in that they authorize a summary taking of property without prior notice or hearing.

Perhaps in recognition of this constitutional principle requiring prior hearing, Congress sought to provide limited avenues of temporary relief for the operator affected by an order issued pursuant to sections 104(b) or 104(c). There is no such opportunity for temporary relief afforded the recipient of a section 104(a) closure order for imminent danger.¹⁵⁴ Section 105(d) of the Act authorizes the Secretary to grant temporary relief from orders issued pursuant to sections 104(b) or 104(c) if the operator files a written request accompanied by a “detailed statement giving reasons for granting

¹⁵⁰ See authorities cited in notes 22-23 *supra* and accompanying text.

¹⁵¹ See authorities cited in notes 24-27 *supra* and accompanying text.

¹⁵² 402 U.S. 535 (1971).

¹⁵³ *Id.* at 542.

¹⁵⁴ 30 U.S.C. § 815(d) (1970).

such relief” and if the evidence presented at the hearing so invoked establishes that there is “substantial likelihood” that the decision of the Secretary of the Interior will be favorable to the applicant. Moreover, the operator must show that temporary relief “will not adversely affect the health and safety of miners in the coal mine.”¹⁵⁵

This temporary relief provision is ineffective to cure the deprivation that has been caused by a summary closure. The closure immediately curtails production, thereby preventing the operator from generating income from property valuable only for that purpose. Moreover, this “relief” is more illusory than real, since the average closure order will have been terminated before the relief can be obtained.¹⁵⁶

The availability of temporary relief from a section 104(b) closure order was recently considered by a three-judge district court panel in *Lucas v. Morton*.¹⁵⁷ The court held that the provision for temporary relief afforded the operator sufficient due process, even though the initial effects of a section 104(b) closure order might be unavoidable. The operator had contended that a section 104(b) notice was unreviewable and that no temporary relief was permitted. Thus, a closure order could be issued under section 104(b) before the hearing on the violation itself was held. The court reasoned that if a written appeal were filed pursuant to section 105(d), the Secretary of the Interior could modify or terminate the closure order pending the required hearing.¹⁵⁸ This possibility of temporary relief before issuance of a section 104(b) closure order, which is theoretical at best, was the basis upon which the court upheld the validity of the section 104(b) order.

The significance of the *Lucas* decision is that the constitutional requirement of an opportunity for hearing prior to nonemergency closure was recognized. The *Lucas* court emphasized that it would not have been able to uphold the constitutionality of the section 104(b) closure provisions without the availability of tempo-

¹⁵⁵ *Id.*

¹⁵⁶ In 1970, the average closure order was in effect only a few days, and many were effective for only a few days. This short period, during which the loss in gross realization from curtailed production can still be great, would not be enough time to reasonably or effectively invoke the relief powers of the Secretary. See TOWARDS IMPROVED HEALTH AND SAFETY, *supra* note 10, at 32.

¹⁵⁷ 358 F. Supp. 900 (W.D. Pa. 1973).

¹⁵⁸ *Id.* at 904.

rary relief pursuant to section 105(d) and the Secretary's power to modify the order pending section 105(d) proceedings.¹⁵⁹ Indeed, the construction of section 105(d), accepted by the court in *Lucas*, is not at all obvious from the face of the Act, and the court unambiguously stated that it adopted this analysis solely because it was the only way that the statute could be reconciled with constitutional requirements.¹⁶⁰ Significantly, the closure provisions of section 104(c) could not withstand a constitutional attack, even with the artificial and generous interpretation of the Act offered in *Lucas*.

More important, however, is the question of what relief is to be afforded the operator whose property is wrongfully seized by MESA inspectors who issue invalid withdrawal orders. The Act makes no provision for compensation, thus requiring the operator to bear the burden of MESA's improper exercise of enforcement discretion. The courts may eventually hold that this economic onus is an unavoidable incident of modern regulation. Such a ruling would leave the operator in a position of having to pass these costs of regulation on to consumers as best as it can. This, however, may prove in time to be an improvident approach as substitutes for coal, such as nuclear and solar energy, become more available and competitive. At that point, the costs cannot be effectively passed on, and the regulatory burden will be fatal to the industry.¹⁶¹ Only proper enforcement or compensation can prevent the Act from eliminating its own reason for existence.

VII. CONCLUSION

The Federal Coal Mine Health and Safety Act of 1969 is one of the most significant pieces of social legislation in our time in that it was intended to dramatically improve the safety and health conditions of thousands of American coal miners. However, in the passion and emotion that precipitated its formulation and enactment, Congress lost sight of the elementary concepts of fairness to the regulated party, the coal mine operator, by conferring drastic economic leverage on front-line bureaucrats with little or no conception of the impact the bureaucratic decisions would have on constitutional rights.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 904-05.

¹⁶¹ See Wheeler & Snow, *supra* note 90, at 250.

The impact of the improper design of the enforcement provisions of the Act has been compounded by the generally questionable construction and application by the IBMA. Only when some short-term balance is restored to the interests of safety and production will the Act properly safeguard the right of miners to a safe and healthy working environment, while protecting the rights of the operators to fair and equitable regulation of their business in the interest of all members of the public.

